

KENYA COMMUNITY SUPPORT CENTRE (KECOSCE)

Statement on the International Criminal Court and the President's Nomination of Constitutional Office Holders

Kenya Community Support Centre (KECOSCE) wishes to register its concern over the politically motivated bid by a section of the Government of Kenya to frustrate the International Criminal Court (ICC) process through the African Union (AU) and the recent unconstitutional attempt to appoint constitutional office holders for the Judiciary.

KECOSCE relates this subversion of the Constitution and the rule of law to nothing but the Presidential succession expected during the 2012 General Elections.

The Politics

Acting upon the unilateral direction of the President, the Vice-President recently visited several African countries to rally support from the AU for a resolution seeking deferral of the Kenyan situation by the United Nations Security Council (UN SC). To bolster this effort and under the guise of complementarity, the President also unilaterally attempted to nominate persons for the positions of Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget—crucial for transformation of the justice system in Kenya.

The political context, the manner of execution and timing of these events indicate nothing but an attempt to defeat justice and entrench impunity. This is evident from the following facts:

1. The Vice President is reportedly in an ethnically based, political alliance, the Kalenjin, Kikuyu and Kamba (KKK) Alliance, with two of the ICC suspects (Uhuru Kenyatta and William Ruto). All three have expressed their intentions to stand for the Presidency in the 2012 General Elections. Thwarting the ICC process would enable them to exercise their individual and collective presidential ambitions.
2. The Party of National Unity (PNU) enlisted the services of supposed civil society organisations (CSOs), including the hitherto unknown Kenya Council for Foreign Relations, allegedly run by the PNU Spokesperson, to make its case for deferral during the AU Summit.
3. The names of the President's judicial nominees are hardly inspiring of confidence in the transformation of the justice system—and, in fact, could be read as trying to ensure that no transformation occurs.
 - a. The suitability of Justice Alnashir Visram as Chief Justice is questionable, in the light of his unprecedented judgment on libel in favour of Nicholas Biwott in respect of the production and sale of a book on the murder of Robert Ouko that restricted freedom of expression. His likely appreciation of the Bill of Rights and his capacity to espouse the spirit and letter of the Constitution is doubtful as a result.
 - b. The impartiality of Kioko Kilukumi as the Director of Public Prosecutions is questionable, given that he was, until Monday, the defence lawyer for one of the ICC suspects in a fraud case (William Ruto).

- c. The appropriateness of William Kirwa as Controller of Budget is in doubt, given that he is under investigation by the Parliamentary Committee on Agriculture in relation to his tenure at the helm of the Agricultural Development Corporation (ADC).

The Legal Issues

On the attempt to defer the Kenyan situation:

1. **Deferral:** Article 16 of the Rome Statute allows for deferral of cases before the ICC by the UN SC, where peace and security is threatened. The peace and security of Kenya is not threatened by continued cooperation with the ICC, as per national and international law—unless the President, the Vice President, PNU and the KKK are intending to create such a threat.
2. **Complementarity:** Article 19 of the Rome Statute stipulates that the ICC would itself defer a case where the State Party concerned is able, willing and has taken credible and tangible steps towards trying cases within its jurisdiction. We note that Parliament has previously blocked two attempts to set up a Special Tribunal to try suspects, in lieu of the ICC. Moreover, the national courts have only prosecuted six cases, returning but a single conviction in respect of the violence of 2007/8. Furthermore, the said cases did not enjoin suspects with the highest responsibility.
3. **Sovereignty:** Article 1 of the new Constitution vests sovereign power in the citizenry and decrees that any subsequent guardian of Sovereign power must exercise such power in accordance with the letter and spirit of the Constitution. The Vice President's mission to convince African States to support the deferral of Kenya's case at the ICC, without popular approval, is a subversion of the sovereignty of the Kenyan people. Latest opinion polls show that 90 per cent of the Kenyan people support the ICC process.
4. **Abuse of Office and Lack of Accountability:** The unilateral decision and subsequent mission by a faction of the Grand Coalition Government to incite African States and the AU into frustrating Kenya's case at the ICC, without Cabinet deliberation and approval and with unapproved expenditure of taxpayers' money is a subversion of the sovereignty of the Kenyan people, an unconstitutionality, an illegality and an abuse of office.

On the supposed judicial 'appointments':

The Constitution at Articles 1, 3, 10, 73, 156, 157, 160, 166 and 228 and Sections 24 and 29 of the 6th Schedule, read together with Chapter 6 on Leadership and Integrity, govern the appointment of holders to the said constitutional offices.

1. **National Values and Principles of Governance:** national values, promoting national unity and the rule of law and requiring inclusiveness and public participation in governance, have been breached.
2. **Leadership and Integrity:** the unilateral nominations, devoid of public and stakeholder input, have failed to assure Kenyans of objectivity, impartiality and ethical leadership.
3. **Equal Representation:** the lack of representation of women in all four nominations has flouted the principle of equality and equity in representation.

4. **Independence of Constitutional Offices:** the Constitution asserts the independence of constitutional offices and, accordingly, stipulates the appointment procedures thereof. All current Judges are to be vetted to remain in office. Justice Visram's nomination as Chief Justice, prior to such vetting, is unconstitutional, as is his nomination without having been advanced by the Judicial Service Commission (JSC). The Vice President in his advertiser's announcement in today's newspapers alludes to some irregular procedure that was agreed on by the two principals on 6th January 2011 at Harambee House. In the said announcement the Vice President indicates that a technical team had been selected to identify suitable candidates. This announcement further confirms that the appointments were irregular and that the technical team was set up to subvert the functions of the Judicial Service Commission.
5. **Consultation:** the Constitution, read together with the National Accord and Reconciliation Act, requires consultation on nominations between the President and the Prime Minister. The Prime Minister's disavowal of the four nominations means both the Constitution and the National Accord and Reconciliation Act have been breached.

Demands

1. We demand that the President, the Cabinet and Parliament respect and enforce the Government's national and international legal obligations in accordance with Article 2 of the Constitution.
2. We demand that the Government support the establishment of a judicial system premised on competence, integrity and equality and equity in representation, in a manner that respects the due process and rule of law.
3. We demand that the PNU, the KKK Alliance—including erstwhile members of the Orange Democratic Movement (ODM)—and other proponents of the deferral of the Kenyan case desist from threatening the public to undermine the ICC process and from exciting ethnic hatred and tensions solely aimed at defeating the ICC process.
4. We demand that the Government and all politicians cease and desist from threatening and intimidating national institutions and non-state actors which have risen to their calling of assisting in the quest for justice.
5. We demand to know the names of the private individuals and so-called CSOs who were supported with taxpayers' monies for politically partisan posturing to attend the AU Summit as well as who authorised their travel and covered their expenses and for those who gave such authorisation to personally refund the Government.
6. Finally, we demand that the Speaker of the National Assembly and the Parliamentary Committee on Legal Affairs uphold constitutionalism and the rule of law by rejecting the said list of unconstitutionally nominated officers.

Signed:

PHYLLIS MUEMA

Executive Director

For: The Board of Directors